SUPREME COURT

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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73-5544

LYNN ROLAND PAPPAS,

Petitioner,

v.

J W J WHOLESALE DISTRIBUTORS, INC.,

Respondent.

REPLY BRIEF OF RESPONDENT IN OPPOSITION TO THE ISSUANCE OF THE WRIT OF CERTIORARI

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INDEX

	Page
STATEMENT OF THE CASE	1
STATEMENT REGARDING RULES OF CIVIL PROCEDURE	2
ARGUMENT	3
CONCLUSION	6

TABLE OF CITATIONS

Cases:

Ashwander v. T.V.A., 297 U.S. 288	4
Black v. Cutler Laboratory, 351 U.S. 300	4
Copperweld Steel Company v. Industrial Commission, 324 U.S. 780	3
Jankovich v. Indiana Toll Road Commission, 379 U.S. 487	4
Siembridge v. Georgia, 344 U.S. 541	4

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STATEMENT OF THE CASE

A.

The petitioner violated the Criminal Statutes of the State of Tennessee by purchasing merchandise from the Respondent and paying for same with a check which was returned three times marked "Insufficient Funds"; pursuant to such statutes Petitioner was arrested by the Sheriff's Department of Shelby County, Tennessee at which time Petitioner paid off the bad check issued earlier by her to the Respondent.

Petitioner thereupon, prior to January 1, 1971, brought a Civil Suit against the Respondent in the Circuit Court of Madison County, Tennessee in which action a jury verdict was obtained; Respondent filed its motion for a new trial which was duly argued before the Trial Court, the judgment set aside, and a verdict in favor of the Respondent entered as a matter of law; that from this verdict the Respondent failed to file in the Circuit Court her motion for a new trial as required by the procedures of the State of Tennessee, but, instead, appealed to the Tennessee Court of Civil Appeals, Western Division, which Court entered a judgment (1) dismissing the appeal because of the failure of the Respondent to file her motion for a new trial with the Trial Court, and (2) adjudicating the merits of the case in favor of the Respondent saying that it could not reach such determination only because of the procedural failure outlines above.

From the judgment of the Court of Civil Appeals, the Respondent petitioned the Supreme Court of the State of Tennessee for the Writ of Certiorari, which petition was denied.

No petition for rehearing was filed with the Supreme Court of the State of Tennessee, and the alleged Federal questions now presented to this Court have never been presented to any Court of the State of Tennessee.

B.

STATEMENT REGARDING RULES OF CIVIL PROCEDURE EFFECTIVE JANUARY 1, 1971 ADOPTED BY THE SUPREME COURT OF THE STATE OF TENNESSEE

The rules of Civil Procedure for the State of Tennessee which are now in effect were adopted by the Supreme Court

of the State of Tennessee January 26, 1970 to *become effective and apply to cases filed on or after January 1, 1971* (subsequent to the filing of Petitioner's suit) and were approved by the General Assembly of the State of Tennessee, Joint House Resolution No. 225, adopted February 19, 1970, signed by the Governor on February 24, 1970; subsequent to the January 1, 1971 effective date of the Rules of Civil Procedure, the Tennessee General Assembly enacted Chapter 565 of the Public Acts of 1972 which repealed several statutes relating to civil procedure and, as result thereof, the Supreme Court of the State of Tennessee on its own motion adopted an Order amending the Rules of Civil Procedure so as to provide that "said Rules of Civil Procedure shall be applicable retrospectively to all civil cases commencing prior to January 1, 1971 *to the extent that their application is necessary to supply a lack of procedural law due to the repeal of code sections by Chapter 565, Public Acts of 1972.*" Notwithstanding the allegation contained in paragraph (b) under the heading "*QUESTION PRESENTED*" in the petition for certiorari filed by the Petitioner in this Court, the rules were *not* "applicable *retrospectively to all Civil cases commencing prior to January 1, 1971.*" but, instead, were applicable only to the extent necessary to supply a lack of procedural law.

QUESTION PRESENTED
ARGUMENT

The Petition for Certiorari should be denied by this Court for the following reasons:

First and foremost, on the vague and empty record filed with the Petition, this Court has nothing on which to base a decision. In such instances this Court has already decided that the Petition should be dismissed. *Copperweld Steel Company v. Industrial Commission*, 324 U.S. 780.

From such record as has been presented to this Court, i.e. the decision of the Court of Appeals of the State of Tennessee, the opinion of the Tennessee Supreme Court denying certiorari and the copy of the Rule Amendment adopted by the Supreme Court, it is apparent that no Federal question, real or imagined, has ever been presented to any Court of the State of Tennessee. On the contrary it appears from the judgment of the Court of Appeals that the decision of the Tennessee Courts can be sustained on a basis of State law independent of any Federal question. This alone is sufficient to deny the petition. *Ashwander v. T.V.A.*, 297 U.S. 288; *Stembridge v. Georgia*, 344 U.S. 541; *Jankovich v. Indiana Toll Road Commission*, 379 U.S. 487.

The rules of this Court, i.e. Rule 19, requires that there be a Federal question of substance in the decision of the State Court before this Court will take jurisdiction and there is no showing of any such Federal question of substance. In addition thereto, for the 14th Amendment to the Constitution of the United States to be applicable, there must be some "State action." The Petition indicates clearly that whatever "loss" Petitioner allegedly has sustained in the State courts was caused by her own failure to comply with long established and unquestioned decisions of the State Courts pertaining to procedure. This is not State action but is a matter of negligent procedure. As was the case in *Black v. Cutler Laboratory*, 351 U.S. 300, the decision involves only the construction of local law by State Courts and, therefore, no substantial Federal question is presented.

This Court "is without jurisdiction to review a judgment of the State Court when the existence of an adequate State ground is debatable." *Stembridge v. Georgia*, 343 U.S.

541, and it appears without contradiction that this most assuredly would apply in this case.

The Petition would mislead this Court by stating under the heading "*QUESTION PRESENTED*" in subparagraph (b) that the Amendment to the Rules of Civil Procedure adopted by the Supreme Court of Tennessee on April 24, 1973 applied "retrospectively to all civil cases commencing prior to January 1, 1971." This quote is misleading because that is not what the Amendment states. A reference to the copy of the amendment attached to the Petition will show that such amendment applied only "to the extent that their application is necessary to supply a *lack* of procedural law due to the repeal of code sections by Chapter 565, Public Acts of 1972." (Emphasis supplied.) The decision of the Court of Civil Appeals sets forth abundant authority governing the procedure in question and acted thereon. This question was presented to the Tennessee Supreme Court by Petition for Writ of Certiorari which was denied. It is obvious that no lack of procedural law was involved and, therefore, the Rule Amendment has no application. Lastly, but perhaps more importantly in this area, the Petitioner does not furnish this Court with a copy of the Rules of Civil Procedure so amended, and, therefore, there is nothing before this Court to indicate what difference it would make even if the rules were to be said to apply to this case. The Petition leaves this to the imagination of this Court which, of course, presents no grounds at all. Petitioner refers to the "ancient procedural rule" in paragraph (a) under "*QUESTION PRESENTED*" which clearly establishes that the rule under which the Court of Civil Appeals and Supreme Court acted was a long established procedural rule which was simply ignored by the Petitioner.

CONCLUSION

Respondent believes that the Petition sets forth no Federal question of substance, that the action of the Tennessee Courts is clearly grounded and can be supported on independent State law, that the record filed with this Court is so vague and incomplete that this Court has little, if anything, on which to base a decision, that the Petition does not conform to the requirements of Rule 19 and that, therefore, such Petition should be denied.

Respectfully submitted,

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